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No. 5251

IN THE

Supreme Court of the United States

OCTOBER TERM 19....

CAMCO, INCORPORATED,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Camco, Incorporated[1] petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in the instant case on January 11, 1965.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 340 F. 2d 803.[2] The decision

[1] Hereinafter called the Petitioner.

[2] The opinion, judgment, order denying petition for rehearing and decree are reproduced in Appendix A, *infra*.

and order of the National Labor Relations Board[3] is reported at 140 NLRB 361.[4]

JURISDICTION

The opinion and judgment of the Court below were entered on January 11, 1965. On February 1, 1965, a petition for rehearing was timely filed. On May 19, 1965, the petition for rehearing was denied, and a decree enforcing, in part, the order of the Board was entered on June 7, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The jurisdiction of the Court below and of the Board rested on 29 U.S.C. § 160.

QUESTIONS PRESENTED

I. Did the Court below err in placing primary reliance upon the laws of mathematical probability and in completely disregarding the findings and conclusions of the Trial Examiner, in granting enforcement of certain portions of the order of the Board relating to the selection of certain employees for economic lay-off?

II. Did the Court below err in determining which of the employees were laid-off for an allegedly discriminatory reason?

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[3] Hereinafter called the Board.

[4] References to the formal papers, including the finding of fact, conclusions of law and orders of the Trial Examiner and of the Board, printed as Volume I of the Transcript of the Record in the Court below, are designated by the appropriate page number in Volume I of the Transcript of the Record preceded by "R".

References to portions of the testimony and exhibits, printed as the Joint Appendix to the briefs of the parties in the Court below, are designated by their appropriate page number in the Joint Appendix preceded by "J.A."

Nine copies of Volume I of the Transcript of Record and the Joint Appendix are filed herewith.

III. Did the Court below err in granting enforcement of the portions of the Order of the Board relating to the interrogation of employees?

STATUTES INVOLVED

The relevant statutory provisions are Sections 7, 8(a)(1) and (3), and 10(e) of the National Labor Relations Act, as amended[5] (29 U.S.C. § 151 *et seq.*). These provisions are set forth in Appendix B, *infra*.

STATEMENT

The Petitioner is a Texas corporation engaged in the manufacture and sale of precision valves, regulators and controllers in Houston, Texas (R. 28-29).

The Petitioner employed approximately 300 employees (J.A. 309, 4), of which approximately 150 were employed in the production departments (J.A. 309, R. 43). The production departments consisted of the machine shop, the welding shop, the assembly department, the tool crib, the grinding room and the production control department (J.A. 170).[6]

During November and December 1961, the Petitioner's business declined (R. 30, J.A. 202, 171-173). During late November or early December 1961, the Petitioner's President, Harold E. McGowen, Jr., conferred with the various department heads, including Vice President Hughes, who was in charge of the production departments (J.A. 170), and it was decided that costs of operations must be reduced (R. 30, J.A. 202-03, 171). It was agreed that monthly

[5] Hereinafter called the Act.

[6] See General Counsel's Exhibit 2-A (J.A. 323), which lists the names of the production employees, except for the employees in the production control department (J.A. 170).

expenses should be reduced by $30,000.00 and that 40% of this reduction in monthly expenses should be absorbed by the production departments (R. 30, J.A. 203, 171). However, because of the Christmas holidays, it was decided that any reduction would be deferred until after January 1, 1962 (R. 30, J.A. 203-04, 171-72).

The January Separations. On January 2, 1962, the Petitioner decided to then only partially effect the proposed reduction in the costs of operations and to wait another month before making a final decision as to whether or not to complete the total reduction of $30,000.00 in the monthly costs of operations (R. 30, J.A. 204-05, 173).[7] To accomplish this partial reduction of operating costs, the Petitioner had a reduction in personnel for each of its departments, including sales, general office (including accounting), engineering and inspection, and production (J.A. 177, 205). Of the total of 37 employees separated during the January reduction, 18 of those employees were employed in the production departments (R. 30-31, J.A. 176, 308). The reductions in the production departments were accomplished by the retirement of 3 employees on January 5, 1962 (R. 30, J.A. 173, 204), the lay-off of 4 employees on January 4, 1962 (R. 31, J.A. 174-75), the lay-off of 6 employees on January 5, 1962 (R. 31, J.A. 174-75), the lay-off of 1 employee on January 8, 1962, the resignation of 2 employees on January 11, 1962 (R. 31, J.A. 176), the resignation of 1 employee on January 18, 1962 (R. 31, J.A. 176), and the resignation of 1 other employee during the month of January 1962 (R. 31, J.A. 176).

The employees who were laid-off during January 1962 were selected based upon their ability and attitude and,

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[7] A sales report for the previous month is available to the Petitioner on the first of each month (R. 30, fn. 3, J.A. 179, 205). The Petitioner had the report for the month of December 1961, in its possession on January 2, 1962 (R. 30, fn. 3, J.A. 205).

everything being equal, seniority (R. 31, J.A. 176). The Board did not in any manner question the Petitioner's effectuation of this reduction in force.

The February Separations. In the latter part of January 1962, a rumor started at the plant that further reductions in personnel would be made in February (J.A. 221, 244-45, 257). On February 1, 1962, it was decided that the remaining reductions in the costs of operations should be made (R. 31, J.A. 205-06, 178-79).[8] Immediately following this decision, the advertising department was completely abolished (J.A. 177), 4 employees were separated in the sales department, 6 employees were separated in the general office (including accounting), 1 employee was separated in the engineering and inspection department, and 18 employees were separated in the production departments (R. 31, 44, J.A. 309, 177).

In selecting the employees for lay-off in the production departments, Vice President Hughes contacted the various department heads and requesting that each of them submit to him the names of the employees they had selected for lay-off from their particular department (J.A. 180). One such department head was the shop superintendent, Theeck (J.A. 212), who was instructed by Hughes to submit to him the names of 10 employees for lay-off, after consulting with his foremen (J.A. 180, 310, 215-16).[9] Theeck conferred with his two turret lathe foremen on the day and night shifts, Cook and O'Pry, and asked that each submit to him the

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[8] The sales report for the month of January 1962 was received by the Petitioner on February 1, 1962 (J.A. 205, 179).

[9] Most of the employees in the production departments were selected from the shop, because the shop employed the bulk of th production employees (J.A. 310). The machine shop includes the turret lathes, the automatic lathes, the engine lathes, the honing machines and the drill presses (J.A. 212).

names of 4 employees (J.A. 216-17, 245, 258).[10] The remaining two employees were selected by their foremen from among the automatic lathe operators (J.A. 217).

Foreman Cook recommended that Locke, Irby, Ledbetter and Bownds be laid-off (J.A. 217-18, 220, 245-46). Foreman O'Pry recommended that Carrier, Cox,[11] Clepper and McCall be laid-off (J.A. 218, 220, 258-59). Foreman Villagomez recommended that Hughes, who was an automatic lathe operator on the second shift, be laid-off, and Foreman Alexander recommended that Barnett, who was an automatic lathe operator on the first shift, be laid-off (J.A. 310, 218-20). The names of these 10 employees were those submitted by Shop Superintendent Theeck to Vice President Hughes on February 8, 1962 (J.A. 180, 220, 217-18). In selecting these 10 employees for lay-off from the production departments, the same factors were utilized as had been during the January 1962 lay-off, *i.e.*, primarily ability and attitude, and then, if all else was equal, seniority (R. 41, J.A. 181). Of these 10 employees, only 8 were laid-off, since Irby was discharged and McCall quit.

Although Irby had been selected for *lay-off* (J.A. 246-47, 249-50), he was in fact *discharged* on February 16, 1962, because a creditor had threatened garnishment of his wages (J.A. 196, 183-84, 250). Earlier that day, Irby was called to Vice President Hughes' office, along with Foreman Cook, and was presented with a letter to the Petitioner from a clothing store,[12] which gave a final notice before garnish-

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[10] No employees who worked on the 15 turret lathes had been selected for lay-off in January 1962 (J.A. 213-15).

[11] The Court below denied enforcement of those portions of the Board's order relating to the lay-off of Cox.

[12] See Respondent's Exhibit No. 2 (J.A. 36). This letter had been received by the Petitioner's mail clerk on February 14, 1962, and came to Vice President Hughes' desk on February 16, 1962 (J.A. 183, 196).

ment of Irby's wages (J.A. 234, 249-50). During that conference, Hughes advised Irby that this was against the Petitioner's published policy, that he could not work for the Petitioner and permit this to happen, and that he was being discharged (J.A. 243-44, 183-85). This policy had been construed and uniformly applied to employees who, as Irby, had been threatened with garnishment of wages (J.A. 185-86). Although the employees had a fund from which they could borrow money in cases of emergency without the payment of any interest, Irby had made no effort to utilize money from the employees' fund (J.A. 187-88).

Although McCall had been recommended for lay-off (J.A. 268-69), he in fact was not laid-off because he voluntarily *quit* (J.A. 268-69). On February 15, 1962, McCall advised Foreman O'Pry that he had another job opportunity and asked O'Pry whether or not he should accept it (J.A. 266-67).[13] Foreman O'Pry recommended that McCall accept that job (J.A. 276-77). The following day, McCall did not report for work and McCall's wife telephoned and advised O'Pry that McCall had accepted the new job and would be by to get his paycheck and work tools the following Monday (J.A. 269). McCall began his new job on the following Monday, February 19, 1962 (J.A. 165, 167).

One additional employee, McMen, who worked in the tool crib, was *discharged* by Vice President Hughes on February 13, 1962 (J.A. 311, 313-14).[14] The remaining 7 employees in the production departments that left in February

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[13] McCall had filed an application for employment with Barrett Machine Works on February 15, 1962, and had stated in his application that he would be available to start work on Monday, February 19, 1962 (J.A. 166-67). See Respondent's Exhibit No. 3 (J.A. 337).

[14] The Court below denied enforcement of those portions of the Board's order relating to the discharge of McMen.

1962 either voluntarily quit or took leaves of absence (J.A. 183, 311).

The Petitioner's Knowledge of Union Activity. Sometime in January 1962, an employee, McCall, contacted a Union representative and discussed the possibility of organizing the employees (R. 33, J.A. 74). This employee was advised by the Union representative that if enough interest were shown by the employees, the Union would possibly consider making an organizational effort (R. 33, J.A. 47). No contention was made, and no evidence was adduced to show, that the Petitioner had any knowledge of any of McCall's activities.

On February 9, 1962, Locke, another employee, arranged for an organizational meeting between a representative of the Union and employees to be held on the next day (R. 33, J.A. 21-22). No contention was made, and no evidence was adduced to show, that the Petitioner had any knowledge of any of Locke's activities.

On February 10, 1962, 16 of the employees[15] attended the Union meeting, signed authorization cards, and formed an organizing committee consisting of Baggett, Bownds, Locke, McCall and McMen (R. 33, J.A. 23, 48).

The first knowledge obtained by any supervisor of any Union activity was by Foreman O'Pry on February 9, 1962 (J.A. 259). On that day, an employee, Williams, asked O'Pry if he was going to the Union meeting the next day (J.A. 259). O'Pry did not know which employees planned to attend the Union meeting. No other supervisor was

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[15] The names of these employees were Yeager, Koscianski, Patterson, Long, Baggett, Locke, Carrier, Irby, Ledbetter, Hughes, Barnett, Bownds, Cox, Clepper, McCall and McMen (R. 64-70, J.A. 17-18, 22-23, 37-38, 47-48, 94-96, 128, 145).

aware of any Union activity at that time (J.A. 246, 247, 255, 311-12).

The Interrogation. No interrogation of any employee occurred at any time prior to the selection of the 10 employees for lay-off or at any time prior to the Union meeting. At the time the Petitioner obtained its first knowledge of Union acitivity, the foremen had already made their recommendations of those employees to be laid-off, all of which had already been approved by Shop Superintendent Theeck and delivered to Vice President Hughes.[16]

The only interrogation by any of the supervisors which the Board found to be violative of Section 8(a)(1) of the Act occurred on February 13 and 15, 1962. This interrogation was by Shop Superintendent Theeck on one occasion, by Foreman O'Pry on five occasions, and by Foreman Cook on one occasion.

On February 15, 1962, as Theeck was walking past Locke in the shop, he asked "what [Locke] had heard about a union or a meeting" and Locke replied that "[he] attended the meeting. There is no secret" (J.A. 222, 226). The subject was not pursued any further by either Theeck or Locke, except during a "general discussion" which followed, when Theeck advised Locke of the benefits he had obtained from the Petitioner (J.A. 222).[17] Theeck did not interrogate any

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[16] After the foremen's recommendations were made, the foremen did not have any occasion to make any changes in their recommendations (J.A. 246, 272), except that on February 15, 1962, Foreman O'Pry expressed his desire to retain Carrier, if possible (J.A. 272, 282-83).

[17] Theeck and Locke had been friends for approximately 30 years (J.A. 227), and Theeck had assisted Locke in obtaining his job with the Petitioner (J.A. 227).

other employee about the Union at any time (J.A. 227, 223, 224-25, 226).[18]

On February 13, 1962, Foreman O'Pry[19] asked 5 employees, McCall, Cleeper, Cox, Yeager[20] and Williams[21] if they had "attended the union meeting" (J.A. 271-72, 260, 261, 266, 268). McCall, Cleeper and Yeager replied that they had attended the meeting (J.A. 271-72, 260, 261, 268). Cox and Williams,[22] denied that they had attended the meeting (J.A. 266, 268, 271-72).[23]

Foreman Cook began hearing "rumors" on February 13, 1962 (R. 45, J.A. 246). At that time, he asked Locke "if he knew anything about any of the union rumors that had been going around the shop" and stated that "it seemed

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[18] Ledbetter approached Theeck and asked him what he knew about the Union rumor (J.A. 223). Theeck replied that he "didn't know anything about it" and made no inquiry of Ledbetter (J.A. 233).

[19] The foremen, such as O'Pry and Cook, constituted the Petitioner's "lowest level of supervision" and there were no other levels of supervision between these foremen and the employees (J.A. 231). The foremen did not have the authority to terminate any employees without consulting their superior (J.A. 234).

The close relationship between the foremen and the employees was shown by the incident in which an employee, Williams, approached Foreman O'Pry and asked if O'Pry was going to the Union meeting (J.A. 259).

[20] Yeager was not laid-off and continued to be employed by the Petitioner (J.A. 272).

[21] Williams was not laid-off and continued to be employed by the Petitioner (J.A. 272).

[22] Williams had not attended the Union meeting (R. 40, J.A. 17-18, 22-23, 37-38, 47-48, 95-96, 128, 145).

[23] After Cox had been laid-off on February 16, 1962, and at the time he was given his final check, he volunteered to Foreman O'Pry that he had attended the Union meeting (J.A. 266, 271). Prior to that occasion, O'Pry had not been aware that Cox had attended the Union meeting (J.A. 266).

to be the general discussion around there" (J.A. 238). Locke replied that he "didn't know anything about them" (J.A. 238). Cook did not make any further inquiry of any employee about the union (J.A. 238-39).[24]

The Board's Conclusions and Order. The Trial Examiner credited the testimony of the Petitioner's witnesses regarding the necessity of an economic lay-off in February 1962, and also found that the selection of the 10 employees for lay-off in the production departments had occurred at a time when the Petitioner had no knowledge of any Union activities by any employee. The Trial Examiner further found that although Irby had been selected for the lay-off he was in fact *discharged* because of threatened garnishment of wages. The Trial Examiner further found that although McCall had been selected for lay-off, he voluntarily *quit* his job (R. 42). The Trial Examiner found that the eleventh employee, McMen, was discharged for cause (R. 41). Based upon these findings, the Trial Examiner concluded that the General Counsel had failed to sustain his burden of proof; that the Petitioner had discharged or terminated the employment of each of the 11 employees for good cause or for substantial economic reasons, and that the Petitioner had not violated Section 8(a)(3) or (1) of the Act (R. 57-58, 49).

The Trial Examiner found that the inquiries of Theeck, O'Pry and Cook constituted only "technical violation of Section 8(a)(1) of the Act" and that it would not effectu-

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[24] The Board found that during that conversation Foreman Cook supposedly advised Locke to "keep his feet on the ground" and that it would be to Locke's benefit if he "stayed out of it" (R. 68-69). As found by the Trial Examiner, the credited testimony of Foreman Cook established that no such remarks were made to Locke (R. 45-46, J.A. 238-39). Furthermore, even the discredited testimony of Locke would not support the Board's finding (R. 32).

ate the policies of the Act to enter a cease and desist order "considering the whole record" (R. 49, 58).

The Board reversed the findings and conclusions of the Trial Examiner and held that the termination of the 11 employees and the interrogation of the 7 employees were violative of the Act. The Board did not question the findings of the Trial Examiner that there was in fact an economic necessity for the reduction in personnel during February 1962 (R. 70-71). The Board, however, concluded that the particular employees in the production departments who were laid-off, were selected because of their union activity (R. 71). The Board emphasized that the Union meeting occurred on February 10, 1962, that 1 of the employees was discharged on February 13, 1962, and that 10 other employees were *laid-off* on February 16, 1962 (R. 71-72), despite the findings of the Trial Examiner that although Irby had been selected for lay-off, he in fact was *discharged* for cause and that although McCall had been selected for lay-off, he in fact *quit*. The Board attempted to justify its conclusion by rejecting the Trial Examiner's finding, based upon the credited testimony of the Petitioner's witnesses, that the 10 employees were selected for lay-off prior to the Petitioner having any knowledge of any Union activity (R. 72-73). The Board rejected this finding of the Trial Examiner based *solely* upon "common sense and the law of mathematical probability" (R. 73-74), despite the fact that this finding by the Trial Examiner was based upon *undisputed* evidence.

Although the Board accepted the credibility findings of the Trial Examiner relating to the 7 acts of interrogation, the Board found that such actions restrained and coerced the employees in violation of Section 8(a)(1) of the Act, and concluded that such conduct warranted the issuance of a remedial order (R. 69).

The Opinion of the Court Below. The Court below concluded that McMen and Cox were discharged for cause and refused enforcement of the order of the Board as to the reinstatement of those 2 employees. The Court below then proceeded to grant enforcement of the order of the Board relating to the reinstatement of 9 other employees and to the alleged illegal interrogation.

The opinion of the Court below proceeded from the premise that considering only the testimony of the witnesses of the Petitioner and the employees, "the evidence on both sides is about even."[25] The Court below then reasoned that by adding the Board's inferences drawn from allegedly admitted facts, the record weighed very heavily against the Petitioner. The foundation for these inferences — of both knowledge and discriminatory motivation — primarily consisted of mathematical calculations regarding the number of Union adherents interrogated as compared to the total number of employees terminated, and a comparison between the number of Union adherents discharged or laid-off with the number of Union adherents who attended the Union meeting. The Court below attempted to justify its conclusion by reasoning that "playing a numbers game"

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[25] This reasoning by the Court below is at least questionable in view of the Court's admission that the testimony of the Petitioner's witnesses "was internally consistent" and "was not weakened to any extent on cross-examination", and that in comparison at least some of the employees' testimony was "weakened on cross-examination." This imbalance in the weight of the testimony in favor of the Petitioner can hardly be said to have been placed in balance by the inconsistent testimony of one employee, Baggett, since reviewing a cold record, Baggett may not reasonably be regarded as a witness who "seems free of self-interest." Common sense and a recognition of elementary principles of industrial relations would hardly permit the conclusion that an employee actively engaged in a Union organizational effort, testifying on matters having a substantial impact upon the organizational effort of which he was a vital part, was "free of self-interest."

was a proper standard for determining the substantiality of inferences. The Court below supported its "numbers" theory by reasoning that "[a] man cannot cross a street without first having made a flash calculation of his chances of reaching the other side, based on his experience with the law of probabilities."

THE REASONS FOR GRANTING A WRIT

I. The conclusion by the Court below that 9 employees were discriminatorily selected for economic layoff, which was based upon the laws of mathematical probability and which failed to give any weight to the findings and conclusions of the Trial Examiner, is in conflict with principles established in decisions by this Court and constitutes such a departure from the accepted and usual course of administrative and judicial proceedings as to call for an exercise of this Court's power of supervision

The question before this Court is whether a Court of Appeals must follow the mandate of Section 10(e) of the Act and consider the record as a whole or whether it should be confined to such evidence in the record as may be favorable to the Board's decision without taking into account whatever in the record fairly detracts from its weight. The Board's evidence in the instant case was an extremely meager amount of proof, to say the least. The inferences and conclusions which were drawn from that bare minimum of evidence far exceeded the facts. When this evidence is viewed in the light of the overwhelming evidence to the contrary, which was not done by the Court below, the evidence simply does not support the decision.

The Fifth Circuit, since the early days of the Wagner Act, has had difficulty in applying the substantial evidence rule in reinstatement cases. First, it applied the rule too

strictly against the Board. See *NLRB* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 438 (5th Cir. 1941). Recently, in *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, this Court took occasion to remind the Court below of the admonition of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474. Now, the Fifth Circuit is found at the opposite extreme, as shown by its enforcement of certain portions of the Board's reinstatement order in the instant case. This action by the Court below exemplifies the present attitude on the part of the Court below to grant enforcement of the Board's reinstatement orders, without regard to the strength of the inferences of illegal motivation, the employer's knowledge of the employees' union activities, and the persuasion of the Trial Examiner's findings and conclusions. In effect, the opinion of the Court below in the instant case is that if there is any evidence whatsoever to support the Board's decision, however meager, then the Court of Appeals must enforce. This has not been the law for a number of years.

In *Universal Camera, supra* 340 U.S. at 487-88, 490, this Court stated as follows:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences would be drawn, the new legislation [the Taft-Hartley Act] definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight . . .
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> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that

> courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds."

A careful examination of the reasoning of the Court below in the instant case establishes that the Court departed from these principles. Accordingly, this Court's corrective action is required in order to secure uniform administration of the national labor policy.

In decreeing enforcement of those portions of the Board's order relating to 9 employees, the Court below placed primary reliance upon a theory which is completely foreign to our jurisprudence, *i.e., the law of mathematical probability.* This theory upsets a fundamental concept of our jurisprudence, which in substance is that the law is not an exact science. Our jurisprudence has continuously distinguished logic and experience from the axioms and corollaries of mathematical problems. For example, the late Mr. Justice Oliver Wendell Holmes, Jr., in THE COMMON LAW, at page 1, wrote as follows:

> "It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is,

> we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."

Moreover, a careful analysis of the record in the instant case reveals that the Court below considered only the "numbers" which supported that Board's findings and completely disregarded the other mathematical calculations which opposed the Board's view. For instance, the evidence showed that of the 16 employees who attended the Union meeting (R. 64-70, J.A. 17-18, 22-23, 37-38, 47-48, 95-96, 128, 145),[26] only 10 had been selected for lay-off and only 8 were in fact laid-off.[27] Of the 8 laid-off, efforts were made by the foreman to prevent the lay-off of one of these employees even after the foreman had become aware of his attendance at the Union meeting (J.A. 272). Of the 16 employees who attended the Union meeting, only 10 were interrogated. Of the 10 employees who attended the Union meeting and were interrogated,[28] 5 admitted attending the

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[26] The names of these employees were Yeager, Koscianski, Patterson, Long, Baggett, Locke, Carrier, Irby, Ledbetter, Hughes, Barnett, Bownds, Cox, Clepper, McCall and McMen.

[27] The names of the 10 employees selected for lay-off were Bownds, Locke, Ledbetter, Irby, Carrier, Cox, Clepper, McCall, Hughes and Barnett.

[28] The names of these employees were McCall, Clepper, Carrier, Cox, Baggett, Yeager, Locke, Bownds, Ledbetter and Irby.

meeting[29] and 5 denied attending the meeting.[30] Of the 5 employees that admitted attending the meeting, 2 were not selected for lay-off.[31] Of the 10 employees selected for lay-off, 2 were not interrogated (J.A. 265).[32] Consequently, the credible evidence established that prior to the lay-off, the Petitioner obtained knowledge that only 3 out of the 10 employees selected for lay-off had attended the Union meeting.[33] Of these 3 employees, only 2 were in fact laid-off.[34]

There were other relevant "numbers" which the Court below did not consider. For instance, the 8 Union adherents who were in fact laid-off were not the only employees laid-off. Eleven other employees were laid-off at the same time, and, in addition, one entire department was completely abolished (R. 31, J.A. 177, 309). The inclusion of these numbers in the calculation results in a much different picture. Of a total of 16 employees who attended a Union meeting, only 10 such employees were selected for lay-off, along with 11 other employees who did not attend the Union meeting. In other words, less than one-half of the employees laid-off attended the Union meeting.

Other admitted facts which weighed heavily in favor of the Petitioner were completely disregarded by the Court below. For instance, the undisputed facts established that the 10 employees selected for lay-off in the production

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[29] The names of these employees were McCall, Clepper, Carrier, Baggett and Yeager.

[30] The names of these employees were Cox, Locke, Bownds, Ledbetter and Irby.

[31] The names of these employees were Baggett and Yeager.

[32] The names of these employees were Barnett and Hughes.

[33] The names of these employees were McCall, Clepper and Carrier.

[34] The names of these employees were Carrier and Clepper.

departments were selected by their foremen in accordance with objective standards, *i.e.*, primarily ability and attitude, and then, if all else was equal, seniority (R. 41, J.A. 181). Admittedly, in applying these objective standards, the 10 employees selected for lay-off were properly evaluated. Furthermore, the same objective standards had been applied in the first lay-off in January 1962.

The impact of all of this evidence, which was opposed to the Board's view, was completely disregarded by the Court below in direct violation of the mandate of this Court that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp.* v. *NLRB, supra* 340 U.S. at 488.

A careful review of the opinion of the Court below shows an additional error of even more fundamental significance, *i.e.*, the Court below gave no weight to the credibility findings by the Trial Examiner. Such a disregard of the credibility findings of the Trial Examiner is diametrically opposed to the standards established by this Court. In *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, this Court recognizes that since "the Examiner . . . sees the witnesses and hears them testify, while the Board and the reviewing Court look only at the cold records," the significance of the Trial Examiner's finding "depends largely upon the importance of credibility in the particular case." The resolution of credibility in the instant case was of paramount importance, since the determination of whether to believe the testimony of the Petitioner's witnesses or the employee witnesses was dispositive of the case. Accordingly, the complete failure by the Court below to consider the substantiality of the Trial Examiner's findings was directly contrary to the teaching of this Court in *Walton, supra.* Compare *NLRB* v. *New England Web, Inc.*, 309 F. 2d 396 (1st Cir. 1962).

II. The erroneous conclusion by the Court below that 9 employees were discriminatorily laid-off, when admittedly only 8 employees were laid-off, is in conflict with the applicable decisions of other Courts of Appeal

The Court below concluded that McMen and *Cox* were discharged for cause and refused enforcement of the order of the Board as to the reinstatement of McMen and *Cox*. The Court below then proceeded to grant enforcement of the order of the Board relating to the reinstatement of the 9 remaining alleged discriminatees, including *Irby* and *McCall*.

The credible evidence established that McMen and *Irby* were discharged for cause, and that *McCall* voluntarily quit. Only 8 employees, including *Cox* (with respect to whom the Court below denied enforcement), were laid-off and could be included within the ambit of the reasoning of the opinion of the Court below which found that substantial evidence supported the order of the Board.[35]

The granting of enforcement of the portions of the Board's order relating to *McCall*, who voluntarily quit, and *Irby*, who was discharged for cause, is in direct conflict with the decisions of other Courts of Appeal. See *Steel Industries, Inc.* v. *NLRB*, 324 F. 2d 173, 177 (7th Cir. 1963); *Dunn Bros., Inc.* v. *NLRB*, 321 F. 2d 185 (6th Cir. 1963); *NLRB* v. *Winona Knitting Mills., Inc.*, 163 F. 2d 156 (8th Cir. 1947).

III. The conclusion by the Court below that the portions of the Board's order relating to the interrogation of employees was entitled to enforcement, is in conflict with applicable decisions by other Courts of Appeal

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[35] A composite of the relevant facts relating to Irby, McCall and Cox are stated *supra*.

In granting enforcement of those portions of the order of the Board relating to the interrogation of employees, the Court below placed primary reliance upon the remarks of Professor Bok, who warned that "employers must beware of interrogation unless (1) they have a valid purpose for obtaining information concerning the union's strength; (2) they communicate this purpose to the employee; and (3) they assure the employee that no reprisals will be taken." See Bok, *The Regulation of Campaign Tactics In Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38, 107, fn. 2 (1964). The reliance by the Court below upon such standards results in an unwarranted shifting of the burden of proof and is in direct conflict with the standards applied by other Courts of Appeal. See, *e.g., NLRB* v. *McCatron,* 216 F. 2d 212 (9th Cir. 1954), *cert. denied,* 348 U.S. 943; *NLRB* v. *Power Equip. Co.,* 313 F. 2d 438, 440 (6th Cir. 1963). Even Professor Bok admitted that "by and large, the circuits have been reluctant to accept so strict an approach." *Ibid.* at 107. Interestingly, Professor Bok's primary authority for the recognition of the above-quoted warning was *S. H. Kress & Co.,* 137 NLRB 1244, which was reversed by the Ninth Circuit in *S. H. Kress & Co.* v. *NLRB,* 317 F. 2d 225 (9th Cir. 1963).

CONCLUSION

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21301

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

CAMCO, INCORPORATED,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D.C.

(January 11, 1965.)

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

WISDOM, Circuit Judge: In this unfair labor practice case, Camco, Inc., a Texas corporation manufacturing oil field equipment, contends that it made a good faith reduction in force because of a decline in business brought about by Hurricane Carla. The charging union, District Lodge No. 37, International Association of Machinists, AFL-CIO, contends that the decline in business was a pretext for discharging eleven employees because of their union activities. Camco insists that the eleven men were selected for termination of employment before it knew of their union activities. The Trial Examiner accepted the

Company's explanation, found that Camco had engaged in certain "technical" violations of the National Labor Relations Act but had not engaged in the other alleged unfair labor practices, and concluded that a cease and desist order would not "effectuate the purpose of the Act." The National Labor Relations Board disagreed with the Examiner's conclusions. The Board found that the Company violated Section 8(a)(1) of the Act by engaging in an "extensive campaign of interrogation coupled with promises of benefits and implied threats" and that this "coercive conduct warrants the issuance of a remedial order."[1] The Board found that Camco violated Sections 8(a)(3) and (1) of the Act by discriminatorily discharging the eleven employees. The Board seeks enforcement of an order based on its findings. We grant enforcement of the order, except as to the reinstatement of two of the discharged employees.

I.

Coercion by interrogation is one of the "subtler" forms of management's interference with labor's protected rights.[2] As the differences here between the Examiner and the Board illustrate, the "act of interrogation is not coercive or intimidating on its face, nor is it easy to demonstrate just how often, and under what circumstances, a threat of reprisal will be inferred by the em-

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[1] The Board found it "unnecessary to consider other conduct also alleged as violations of Section 8(a)(1) of the Act as any findings thereon would not affect the scope of the Order." We have considered such other conduct to the extent it throws light on the employer's motivation in the interrogation and discharge of the employees.

[2] Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. L. Rev. 38, 106 (1964).

ployees."[3] *Bourne* v. *N.L.R.B.*, 2 Cir. 1964, 332 F. 2d 47, 48, modifying 144 NLRB No. 75 (Sept. 26, 1963), is helpful in determining the limits of proper interrogation. In that case the court lists five factors to be considered in weighing the lawfulness of company interrogation of employees:

> "(1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?
>
> (5) Truthfulness of the reply."

This list is not intended to be definitive and, as Professor Bok has pointed out, intimidation may occur even if all of these factors cut in favor of the employer. He warns that "employers must beware of interrogation unless (1) they have a valid purpose for obtaining information concerning the union's strength; (2) they communicate this purpose to the employees; and (3) they assure the employees that no reprisals will be taken."[4] Taking the *Bourne* approach, but bearing in mind Bok's formulation

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[3] Bok, n. 2 at 107.
[4] Bok, n. 2 at 107.

of the Board's warning to employers, we enter a *Blue Flash*[5] thicket.[6]

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[5] "[T]he Board is required to determine the significance of particular acts of interrogation in the light of the entire record in the case." Blue Flash Express, Inc., 1954, 109 NLRB 591.

[6] This Court has recognized the coercive effect of interrogation in a variety of cases. The test is whether the questioning tends to be coercive, not whether the employees are in fact coerced. N.L.R.B. v. American Mfg. Co., 5 Cir. 1943, 132 F. 2d 760. A few isolated instances of questioning may not be coercive if there is no background of company hostility to the union. N.L.R.B. v. Fuchs Baking Co., 5 Cir. 1953, 207 F. 2d 737; N.L.R.B. v. Armour & Co., 5 Cir. 1953, 213 F. 2d 625. Nor do a few casual questions violate Section 8(a)(1), if there is no evidence of threats of reprisal or promises of reward. N.L.R.B. v. Mississippi Products Co., 5 Cir. 1954, 213 F. 2d 670. Cf. N.L.R.B. v. Harbison-Fischer Mfg. Co., 5 Cir. 1962, 304 F. 2d 738, 740 (dissenting opinion). But a few questions may be coercive, if there is even slight evidence of threats or if employees are asked to become informers. N.L.R.B. v. Fox Mfg. Co., 5 Cir. 1956, 238 F. 2d 211. Even a single question put to a single employee may be a violation, if there is a background of union hostility. N.L.R.B. v. Griggs Equipment, Inc., 5 Cir. 1962, 307 F. 2d 275. As the Court stated in *Griggs*: "The statements in and of themselves might possibly be lawful and non-coercive, but viewed in its entirety, there is sufficient evidence of a background of union hostility in context with the statements made to bring them within the proscription of Section 8(a)(1) of the Act." 307 F. 2d at 278. Questioning a large number of employees is coercive, if there is evidence of union hostility, such as statements by the company president to one or two workers. Martin Sprocket & Gear Co. v. N.L.R.B., 5 Cir. 1964, 329 F. 2d 417; accord, N.L.R.B. v. Harbison-Fischer Mfg. Co., 5 Cir. 1962, 304 F. 2d 738. Other cases hold that a poll of all or most employees violates Section 8(a)(1) even if there are few other circumstances which show coercive effect. Texas Industries, Inc. v. N.L.R.B., 5 Cir. 1964, 336 F. 2d 128; N.L.R.B. v. Aycock, 5 Cir. 1964, 328 F. 2d 314. Questioning is also much more likely to be coercive, if there is no attempt to reassure the employees against reprisals. Martin Sprocket & Gear Co. v. N.L.R.B., 5 Cir. 1964, 329 F. 2d 417, 419-20. Interrogating key employees during an organizational drive makes the company's anti-union message easier to read than interrogating a few employees at random. See e.g., N.L.R.B. v. Syracuse Color Press, 2 Cir. 1954, 209 F. 2d 597, *cert. denied*, 1954, 347 U.S. 966, 74 S. Ct. 777, 98 L. Ed. 1108, discussed in N.L.R.B. v. Harbison-Fischer Mfg. Co., 5 Cir. 1962, 304 F. 2d 738, 744 (dissenting opinion).

There is no doubt about Camco's anti-union animus, although there is contradictory testimony in regard to a speech by the Company's president in which the anti-union policy was plainly stated. Several employees testified that in October 1961 President Harold E. McGowen, Jr. made a speech to the employees in which he threatened to close the plant if it were unionized. McGowen testified that he made no such threats. His speech was in fact a written statement of over-all plans read at a meeting of stockholders as well as at a meeting of employees. The Examiner discredited the testimony of the employees. The following anti-union statement does appear in the written speech:

> "*Union* — as you know, some 3½ years ago, we had a union election in this plant. This was defeated and since then, we have had absolutely no trouble in this respect. This Company is of the very firm opinion that we will not have a union here. We are against the union in all respects and will do our best to see that it does not come to this plant. If any man feels otherwise, we invite him to leave and go to another plant. This is the American way of life."

In December 1961, President McGowen decided to reduce production personnel because sales and profits were down. Camco terminated four employees on January 4, 1962, six on January 5, and eight more later in the month. February 2, Hughes, head of the production department, instructed Shop Superintendent Theek to submit a list of ten men to be laid off. Theek passed the instructions along to his foremen, Cook and O'Pry. February 7 or 8, the foremen submitted to Theek ten names. All were union supporters and all were terminated February 16.

Efforts to organize the plant did not begin until the middle of January when McCall, a production employee

asked the help of the Union. February 9, Locke, another production employee, arranged an organization meeting at the Union Hall the next day.

Numbers are important in this case. Of the 95 employees in the production department, 16 attended the meeting and signed authorization cards. Of the 16, Camco fired 11; one on February 13, three days after the meeting, and 10 on February 16. These 11 men were the only production employees discharged during February 1962. No non-union man was discharged.

Between the time of the meeting and the time of the terminations, three Camco officials (Shop Superintendent Theek and Foremen O'Pry and Cook) interrogated 11 employees about their union activities; 10 were union adherents. The Company admittedly interrogated nine employees; the tenth was a union leader discharged summarily; there is no evidence one way or the other as to the eleventh.

The discharged employees testified that the interrogators, Theek, O'Pry, and Cook attempted to learn the identity of the men who had been at the meeting and repeatedly said that the men who had attended the union meeting would be fired. Cook testified that the Company knew the identity of the men.

The testimony of the discharged employees was corroborated by the testimony of a union sympathizer, Baggett, who was still working for Camco at the time of the hearing. He testified that when he was questioned he did not admit his union activity; his foreman testified that he did. According to his testimony, one Camco foreman stated that he would not be fired because he had not attended the union meeting. Another foreman stated, before the union meeting, that he was going to the union

hall to take names. A foreman said shortly after the discharge of the ten men that they had been fired because they were "troublemakers and union agitators".

Superintendent Theek admitted that he interrogated one employee. Foreman Cook admitted interrogating four employees, including the one Theek questioned. Foreman O'Pry admitted interrogating seven employees. These interrogations took place in a short period — between February 13 and February 15. February 15, Theek, asked employee Locke if he had attended the union meeting and mentioned the bnefits that the Respondent had given the employees. February 13, Cook asked Locke whether he had heard rumors "going around" about a union. He told Locke "to keep his feet on the ground" and that it would be to Locke's benefit if he "stayed out of it". During this same period, O'Pry, on separate occasions, asked employees McCall, Clepper, Cox, Yeager, and Williams whether they had attended the union meeting.

According to the testimony of Camco supervisory employees, at least 6 of the 10 union adherents questioned denied that they knew anything about the union activity or that they had attended the union meeting. A seventh testified that he denied it; his foreman testified that he admitted it. In *N.L.R.B.* v. *Syracuse Press,* 2 Cir. 1954, 209 F. 2d 597, *cert. denied,* 1954, 347 U.S. 966, 74 S. Ct. 777, 98 L. Ed. 1108, discussed in *N.L.R.B.* v. *Harbison-Fischer Mfg. Co.*, 5 Cir. 1962, 304 F. 2d 738, 744, the Second Circuit emphasized the fact that one of the employees when questioned concealed his union activity. Here, since most of the Camco employees questioned, at least at first, concealed their union activities, the Board could reasonably infer that they were answering under pressure.

Camco argues that the interrogation was only by low-ranking officials and was done informally in the shop

while the men were at work. Theek supervised the machine shop. Cook and O'Pry were foremen under Theek. The place of interrogation and the rank of the interrogators bear on the issue of coercion but, assuming the authority of the interrogators to speak for the Company, the crucial question is not their rank but whether *to the employees* the interrogators represent the Company. See *Hendrix Mfg. Co.* v. *N.L.R.B.*, 5 Cir. 1963, 321 F. 2d 100. Here the record shows that in the minds of the production employees the foremen and supervisor did indeed represent Camco management. Because of the nature of the interrogation and the obvious correlation between the interrogation and the discharges, the Board could reasonably conclude that the questioning was not casual, whether it took place in the shop or in the office of the President of the Company and whether President McGowen or Superintendent Theek was the inquisitor.

Bourne points out that an innocuous question (e.g. How is the union doing?) is much less coercive than a pointed question (e.g. Who are the union leaders?). 332 F. 2d at 48. Two of the Camco employees who answered untruthfully refused to answer innocuous questions (Did they know anything about the union rumors?). If an employee refuses to give a truthful answer even to an innocuous question, the inference of coercion is as strong as if he refused to answer a pointed question.

Questioning is much more likely to have a coercive effect if the purpose of the interrogation is not explained and if there are no assurances against retaliation. See *Martin Sprocket & Gear Co.* v. *N.L.R.B.*, 5 Cir. 1964, 329 F. 2d 417. Camco made no explanation to the interrogated employees and gave no reassurances that their answers would not be held against them. Nothing was done to negate the effect of questioning most of the union adherents, or the effect of Camco's known anti-union policy.

The evidence of promised benefits is not conclusive. The Company made no promise of any specific benefit, but the testimony of Theek, Cook, and O'Pry shows that they did make an effort to persuade the men that it was against their interest to join the Union. Theek's conversation with Locke included a discussion of Camco's employee benefits as compared with the benefits from joining the Union. As for threats, Cook made certain statements to Bounds and Ledbetter which might properly be considered as "implied threats".

Camco deprecates any notion that the questions put to the employees were coercive. The Company draws attention to these facts. There were only seven acts of interrogation, six by minor supervisors. The other inquiry, by Theek, was made to an employee who had been his friend for thirty years. The interrogation consisted only in asking whether the employee had attended the union meeting or had heard about a union rumor, without any effort to obtain other information on union activities. Finally, so Camco contends, such remarks were natural and could be expected in an atmosphere in which such discussions were occurring "all over the shop".

The questioning cannot be plucked out of context. And the context includes these considerations. (1) The Company had publicly announced an anti-union policy. (2) The law of probabilities indicates a close connection between the selection of men for interrogation and the union activities of those men. (3) There is a manifestly close correlation between the interrogations and the terminations of employment. (4) The interrogation was systematic and intensive over a period of only three days. (5) Some of the interrogatees gave untruthful answers, apparently for fear of the consequences of revealing their union activities. (6) The Company did not explain the

purpose of the interrogation to the employees and gave no assurances against reprisals. (7) There is some evidence of coercion by carrot and by stick.

We hold therefore that fair inferences and substantial evidence compel affirmance of the Board's finding that Camco's interrogation of its employees violated Section 8(a)(1) of the Act.

II.

The issue of discriminatory discharge has four distinct components: (1) the employer testimony, (2) the employee testimony, (3) the Examiner's findings, and (4) the Board's inferences from the admitted facts of the case. Here, Camco management testified that the discharges could not have been discriminatory, because Camco decided to discharge the men before the union activity even began. The employees testified that Camco's supervisor and foremen told them that men were going to be fired because of their union activity. The Trial Examiner discredited the employee testimony and credited the employer testimony. The Board, largely relying on inferences from admitted facts, held that the men whose employment was terminated were discriminatorily selected for discharge because of their union activities. Each of these four components creates its own problems.

In earlier decisions in this circuit, we have said that because reinstatement of a discharged employee may be considered a penalty, the evidence of discrimination should be compelling. We said, too, that the Board should accept the employer's testimony if the evidence gives equal support to the employer's explanation and the inference of discrimination, since the employer, testifying under oath,

is in a position to know the motive. *N.L.R.B.* v. *Houston Chronicle,* 5 Cir. 1954, 211 F. 2d 848; *N.L.R.B.* v. *Tex-O-Kan Flour Mills Co.,* 5 Cir. 1941, 122 F. 2d 433. However, many times, too often to cite, we have stated and restated the substantial evidence rule as phrased by the Supreme Court in *Universal Camera* and *Walton.* And, at least since our decision in *N.L.R.B.* v. *Coats & Clark,* 5 Cir. 1956, 231 F. 2d 567, 572, we have held that we cannot disturb the Board's choice if there is a fair conflict between the employer's testimony and a reasonable inference of discrimination. See *N.L.R.B.* v. *Walton Mfg. Co.,* 5 Cir. 1963, 322 F. 2d 187, 189; *N.L.R.B.* v. *Florida Citrus Canners' Cooperative,* 5 Cir. 1963, 311 F. 2d 541. In *N.L.R.B.* v. *Walton Mfg. Co.,* 1962, 369 U.S. 409, 82 S. Ct. 30, 7 L. Ed. 2d 829, the Supreme Court eliminated any residual doubt left over from *Tex-O-Kan* and reaffirmed the tenet that the employer's reasons for his conduct in a discriminatory discharge case are to be given no more weight than in any other type of case under the Act: "There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases." 369 U.S. at 407, 82 S. Ct. 30, 7 L. Ed. at 832.

Still, under *Walton* and *Universal Camera Corp.* v. *N.L.R.B.,* 1950, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456, we must give the employer's testimony whatever weight it deserves in the light of the record as a whole. The employer testifies under oath, and the employer *is* the only one in a position to know why an employee is discharged. The employer's testimony cannot be lightly disregarded. *N.L.R.B.* v. *Florida Citrus Canners' Cooperative.* However, an 8(a)(3) violation always depends on the employer's intent. Those who testify to the circumstances by which the elusive fact of intent must be proved testify under the same oath used by the employer. The

employer's oath carries no more weight than an employee's oath.

Universal Camera spells out the role of the Trial Examiner. There, the Board reversed the Trial Examiner; the Court of Appeals disregarded his findings. The Supreme Court held that the Board's findings must be affirmed if substantial evidence in the record as a whole supports the Board, but the Court also made it clear that the findings of the Trial Examiner are a part of the record, and must be given whatever weight they merit in the circumstances of each case.[7]

When the Board and the Trial Examiner disagree, the Board takes into account the evidence discredited by the Trial Examiner as well as other evidence; it is still part of the record. Similarly, this Court takes into account the evidence relied on by the Trial Examiner as well as the evidence relied on by the Board. The Board may rely on inferences in conflict with testimony the Examiner credits. And this Court may rely on the Board's inferences rather than testimony the Examiner credits. As the Second Circuit puts it:

> "In reaching this conclusion he [the Examiner] relied largely on the testimony of . . . The Company's

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[7] "We do not require that the examiner's finding be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. . . ." 340 U.S. at 496, 71 S. Ct. at 469, 95 L. Ed. at 472.

> manager, as to what his intentions were. The Board, on the other hand, drew contrary inferences from the undisputed facts. Although the Board may not overrule its Trial Examiner by discarding the positive credible testimony of a witness in favor of an inference drawn from tenuous circumstances . . . it may refuse to follow its Trial Examiner in crediting testimony where it conflicts with *well supported and obvious inferences from the rest of the record.* Such refusal is particularly justified where the testimony in question is given by an interested witness and relates to his own motives." (Emphasis supplied.) *N.L.R.B.* v. *Pyne Moulding Corp.*, 2 Cir. 1955, 226 F. 2d 818.

One of the basic premises of *Universal Camera* is that, "The findings of the examiner are to be considered along with the consistency *and inherent probability of testimony*". 340 U.S. at 496, 71 S. Ct. 469, 95 L. Ed. 472. (Emphasis supplied.) This principle is part of the trend towards more liberal rules governing evidence and methods of proof: "However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything 'logically probative of some matter requiring to be proved.'" 340 U.S. at 497. The trend includes inferences based on common sense recognition of probabilities.

Camco argues against the Board's playing a "numbers game". But courts have long accepted an inference of discrimination based on the percentage of discharged employees involved in union activities. Courts should. A man cannot cross a street without first having made a flash calculation on his chances of reaching the other side, based on his experience with the law of probabilities. In more legal language, in *N.L.R.B.* v. *The Newton Company*, 5 Cir., 1956, 236 F. 2d 438, 445-46, we said:

> "Evidence is admissible in a proceeding to determine whether or not there has been anti-union discrimination in a lay-off of the percentage of union adherents involved. . . . The drawing of such inferences as are to be drawn from percentage testimony is within the province of the Board and if reasonably drawn, the inference is evidence, and with other evidence may be substantial evidence such as to entitle the Board's finding based thereon to our acceptance."

In *Newton* the Court found that the inferences were overbalanced by other evidence in the case. But this Court and other courts have relied on such inferences as a basis for enforcing the Board's orders. See *N.L.R.B.* v. *W. C. Nabors,* 5 Cir. 1962, 196 F. 2d 272, 275-76, *cert. den'd,* 1952, 344 U.S. 865, 73 S. Ct. 106, 97 L. Ed. 671; *N.L.R.B.* v. *Sandy Hill Iron & Brass Works,* 2 Cir. 1947, 165 F. 2d 660, 663; *N.L.R.B.* v. *Dinion Coil Co.,* 2 Cir. 1952, 201 F. 2d 484; *cf. Stokeley Foods, Inc.* v. *N.L.R.B.,* 5 Cir. 1952, 193 F. 2d 736. If there is a choice between "two fairly conflicting inferences", we must uphold the Board. *N.L.R.B.* v. *Coats & Clark.*

If we should consider only the testimony of the respondent and the employees and for the moment disregard the Examiner's findings and the Board's inferences, we should say that the evidence on both sides is about even. Camco's management and supervisors testified that they did not know the identity of the union adherents, and that they selected the men on February 8, before the union activity began. This testimony was internally consistent. It was not weakened to any extent on cross examination. According to the testimony of the discharged employees, the Camco foremen and the supervisor told them that Camco knew who the union adherents were, or would soon know. The Camco foremen and supervisor also said that the union adherents would soon be fired. Some but far from

all of this testimony was weakened on cross examination. The discharged employees were corroborated by Baggett, a union adherent who was not fired and was still working for Camco at the time of the hearing. Only Baggett seems free of self interest.

If we add to the testimony the Board's inferences drawn from admitted facts, the record weighs very heavily against Camco. Camco bases its version of the facts on an incredible series of coincidences.

As noted in the discussion of the interrogation issue, ten of the eleven men questioned were union adherents. But there were only sixteen union adherents in the production department where the men worked. Thus, of seventy four non-union production employees, only one was questioned. We have to say that it is a fair inference that Camco must have known the identity of most of the union adherents.

Of the sixteen union adherents, Camco discharged eleven. Camco discharged not one of the seventy four non-union employees. Again we have to say that it is a fair inference that Camco based the discharges on the discriminatees' actual union activity of Camco's knowledge of the fact the discriminatees favored organization of a union at the plant.

This only begins the chain of coincidences. There is a close correlation between the men questioned and the men discharged, whether we examine the totals or the number under each foreman.[8]

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[8] Foreman Cook admitted that he questioned only four men, Bounds, Locke, Ledbetter and Irby. Four of the eleven men discharged were under his supervision. These four were the same four whom Locke had questioned about their union activities, Bounds, Locke, Ledbetter and Irby. Cook must have known these four men were union adherents and must have recommended their discharge for that reason.

The correlation of men questioned and men discharged on Foreman's O'Pry's shift is almost as close. O'Pry testified that

he questioned seven men, Carrier, Cox, Clepper, McCall, Baggett, Yeager, and Williams. Four men were discharged from O'Pry's shift. These four were Carrier, Cox, Clepper, and McCall. All four of these men discharged from O'Pry's shift were union adherents and they were among the seven whom O'Pry questioned. According to O'Pry, Carrier, Clepper, McCall and Baggett admitted their union activity and Cox, Yeager, and Williams denied it. All seven were union adherents except Williams. But the testimony of the six union adherents whom O'Pry questioned was very different. Yeager and Baggett both testified that they did not tell O'Pry that they had been to the union meeting. Yeager and Baggett were the two union adherents who were not discharged. Of the four union adherents who were discharged, three admitted that they told O'Pry they had attended the union meeting. The fourth, Cox, admitted that he did not tell O'Pry that he had attended the meeting, but someone else told him that O'Pry had said he knew Cox had been at the meeting. From all this the Board could reasonably infer that O'Pry selected for discharge those who admitted their union activity.

Three employees were discharged who were not under Foreman O'Pry or Cook. Of the three, McMen was discharged summarily on Tuesday, February 13. The second, John Hughes, did not testify at the hearing. Neither O'Pry nor Cook was asked whether he had questioned Hughes. The third, Barnett, testified that Foreman O'Pry did ask him whether he had attended the union meeting. O'Pry admitted that he had talked to Barnett but denied that he questioned him about the union activity. Barnett worked under Foreman Alexander on the first shift, and O'Pry was a foreman on the second shift. It is very curious that O'Pry happened to speak to a man who did not work under him, who was on a different shift, and who happened to be one of the eleven men discharged several days later. The Board could reasonably accept Barnett's testimony.

The connection between questioned men and men discharged is too close to be an accident. If we accept Barnett's testimony that he was questioned, we get the following totals: Of the eleven union men questioned, nine were discharged and the other two testified that they did not admit their union activity. Of the eleven union men discharged, nine were questioned, there was no evidence either way about the tenth, and the eleventh (McMen) was a union leader discharged summarily the day the questioning began. Yet only one of the approximately seventy four nonunion employees was questioned. From all this we can only infer that Camco selected those employees, who, to the best of Camco's knowledge, were union adherents.

One further inference weakens Camco's explanation. Camco's management testified that some men were terminated in January to cut production costs in the face of lagging sales. The men were terminated a day or two after Camco made the decision. On February 7 Camco supposedly drew up a list of men to be discharged eight days later. Camco offered no evidence to explain the delay. The supposed eight days delay included the beginning and the end of the union activity at Camco. The Board could reasonably infer that Camco did not in fact select the employees before the union activity began.

Camco objects to the Board piling inference upon inference. The so-called rule against pyramiding inferences, if there really is such a "rule" and if it is anything more than an empty pejorative, is simply legalese fustian to cover a clumsy exclusion of evidence having little or no probative value. See 1 Wigmore, Evidence (3d ed. 1940) § 41. In labor discrimination cases the employer usually resorts to the rule when knowledge of union activity and discriminatory motive rest on the same bit of evidence. See e.g., *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 5 Cir. 1955, 222 F. 2d 341; *Interlake Iron Corp.* v. *N.L.R.B.*, 7 Cir. 1942, 131 F. 2d 129. Here, however, there is a broad base supporting the inference of knowledge and the inference of motivation. Call them "findings" or "conclusions" and they may be piled on inferences. Here, the inferences rest on many admitted facts: the total number of union adherents, the total number of production employees, the total number of union men and nonunion employees questioned, the total number of discharged employees questioned, the total number of union and nonunion employees questioned and discharged in each section of the production department, the unexplained lapse of time between the supposed decision to fire and the actual discharge of the men. There

are other significant factual bases on which the Board rests its inferences. In short, the multiple inferences in this case have sufficient probative value to be weighed in the Board's and this Court's reaching a decision. See *N.L.R.B.* v. *W. C. Nabors.*

This case is well within the limits marked out by earlier cases. In *N.L.R.B.* v. *Walton Mfg. Co.* the Board's finding was supported by some employee testimony which directly conflicted with the employer's explanation, but the inference based on the percentage of men discharged was not as strong as the inference in this case, since only slightly more than half of the discharged employees were union adherents. In *N.L.R.B.* v. *W. C. Nabors* there were veiled threats to union adherents but there was no mass of testimony of direct statements that the union adherents would be fired. There was a strong statistical inference (twenty three of the twenty six men discharged were union adherents); in this case *all* of the men discharged were union adherents. In *N.L.R.B.* v. *Dell,* 5 Cir. , 283 F. 2d 733, as in the present case, all of the discharged employees were union adherents but a large percentage of the employees as a whole were not. We said:

> "But it seems to us that it was more than a coincidence that each discharged employee was active in the union organizing movement and each was discharged during the period when the Company was opposing the Union by threats, promises, and other unlawful acts of interference. The record fairly permits the conclusion that anti-union motivation lay behind the Company's action." 283 F. 2d at 736.

Most of the cases denying enforcement lacked at least one of the factors pointing to discrimination in this case,

or there were circumstances which weakened their probative value. Many cases which hold against the Board involved the discharge of a single employee. See e.g., *N.L.R.B.* v. *Fox Mfg. Co.*, 5 Cir. 1956, 238 F. 2d 211; *N.L.R.B.* v. *Birmingham Publishing Co.*, 5 Cir. 1958, 262 F. 2d 2; *Schwob Mfg. Co.* v. *N.L.R.B.*, 5 Cir. 1962, 297 F. 2d 864, 870; *Bon-R Reproductions, Inc.* v. *N.L.R.B.*, 2 Cir. 1962, 309 F. 2d 898, 905-06. In these cases there was no inference based on the percentage of union adherents discharged to rebut the employer's testimony. Some cases of group firings completely lack any basis for an inference resting on the percentage of union men fired. Thus, in *N.L.R.B.* v. *Atlanta Coca-Cola Bottling Co.*, 5 Cir. 1961, 293 F. 2d 300, we held that the Board was not supported by substantial evidence because only half of the employees discharged were union adherents, and half the total number of employees were union adherents; there was no evidence at all that the company knew about the union activities of many of the men discharged. In other cases of group firings, the percentage inference may be overcome by strong evidence that there was "cause" for the discharge or that the company did not know who the union adherents were. *N.L.R.B.* v. *The Newton Co.*, 5 Cir. , 236 F. 2d 438, held that the discharge of a high percentage of union adherents was not discriminatory in that the selection followed a non-discriminatory company rating system. *N.L.R.B.* v. *Moore Dry Kiln Co.*, 5 Cir. 1963, 320 F. 2d 30, 33, held that the inference based on statistics was inadequate, because there was a lack of evidence that the company knew the men were union adherents and because most of the men were discharged on a basis of strict seniority.

It would serve no useful purpose to add pages to this opinion by discussing the case of each employee who was

discharged. This Court has read and re-read the entire record. We find that only McMen and Cox were discharged for cause.

Except as to the reinstatement of McMen and Cox, we GRANT enforcement of the Board's order.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21301

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CAMCO, INCORPORATED,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C.

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

JUDGMENT

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an order of the National Labor Relations Board made on December 28, 1962, in the proceedings known upon the records of the Board as Case No. 23-CA-1393, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Board in this cause be and the same is hereby, enforced in part and denied in part, in accordance with the opinion of this Court.

"Per Wisdom, Circuit Judge"
January 11, 1965

U. S. Court of Appeals
FILED
MAY 19 1965
Edward W. Wadsworth
Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21301

NATIONAL LABOR RELATIONS BOARD,

Appellant,

v.

CAMCO, INCORPORATED,

Appellee.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C. (Texas Case)

(May 19, 1965)

ON PETITION FOR REHEARING

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

Per Curiam:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause is hereby DENIED.

(Original Filed — June 7, 1965)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21301

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CAMCO, INCORPORATED,

Respondent.

DECREE ENFORCING, IN PART, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

By the Court:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated December 28, 1962. The Court heard argument of respect counsel on October 6, 1964, and has considered the brief and the transscript of record filed in this cause. On January 11, 1965, the Court, being fully advised in the premises, handed down its decision enforcing in part and denying in part the Board's Order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that Camco, Incorporated, Houston, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in District Lodge No. 37, International Association of Machinists, AFL-CIO, or in

any other labor organization of its employees, by discriminatorily discharging, terminating, or laying off any employee, or in any other manner discriminating against any employee in regard to hire, tenure, or any other term or condition of employment.

(b) Interrogating employees concerning their membership in, or activities in behalf of, the above-named labor organization, or any other labor organization, in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the National Labor Relations Act (hereinafter called the Act).

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Offer to William J. Locke, Jr., Harold C. Carrier, Dwain M. Irby, James L. Ledbetter, John W. Hughes, Robert S. Barnett, William M. Bownds, Delbert G. Clepper, and Jeffrey L. McCall immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of earnings suffered by reason of the discrimination against him in the manner set forth in the section of the Board's Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports necessary to analyze the amount of backpay due and the right to reinstatement.

(c) Post at its plant at Houston, Texas, copies of the notice attached hereto marked "Appendix." Copies of such notice, to be furnished by the Regional Director for the Twenty-third Region, of the National Labor Relations Board (Houston, Texas) shall, after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director, in writing, within 10 days from the date of this Decree, what steps have been taken to comply herewith.

ENTERED: June 7, 1965

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECREE

of the United States Court of for the Fifth Circuit, enforcing, in part, an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in District Lodge No. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, or any other labor organization of our employees by discharging, terminating or laying off any employee or in any other manner discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

WE WILL NOT interrogate our employees concerning their membership in, or activities on behalf of, the above-named labor organization, or any other labor organization in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act.

WE WILL offer William J. Locke, Jr., Harold C. Carrier, Dwain M. Irby, James L. Ledbetter, John W. Hughes, Robert S. Barnett, William M. Bownds, Delbert G. Clepper, and Jeffrey L. McCall immediate and full reinstatement of their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist

any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities.

All our employees are free to become and remain, or refrain from becoming or remaining, members of any labor organization.

CAMCO, INCORPORATED
(Employer)

Dated.....

By .....
(Representative) (Title)

NOTE: We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application, in accordance with the Selective Service Act, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston 2, Texas, Tel. No. CApitol 8-0611, Ext. 296, if they have any questions concerning this notice or compliance with its provisions.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) of such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, . . . and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective

date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

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"Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United Sates Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The

findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."